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IN THE

Supreme Court of the United States

October Term 1972

No. 72-367

MARK P. ESSLING, a minor, and EDWARD J. ESSLING, a minor, by JAMES ESSLING, their father and natural guardian,

Petitioners,

vs.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM W. ESSLING
Attorney for Petitioners
730 Minnesota Building
St. Paul, Minnesota 55101

JOHNSON, ESSLING,
WILLIAMS & ESSLING
Of Counsel

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IN THE

Supreme Court of the United States

October Term 1972

No. _____

MARK P. ESSLING, a minor, and EDWARD J. ESSLING, a minor, by JAMES ESSLING, their father and natural guardian,

Petitioners,

vs.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Mark P. Essling, a minor, and Edward J. Essling, a minor, by James Essling, their father and natural guardian, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on June 8, 1972.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals, dated June 8, 1972, is unreported and is attached hereto. (A. 2, 3, 4, Exh. "A"). The memorandum opinion of the United States District Court for the District of Minnesota, Third Division, is unreported and is attached hereto (A. 6, 7, Exh. "B").

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254; 28 U.S.C. 2106 and 28 U.S.C. 1331.

QUESTION PRESENTED

Whether there is Federal "subject matter jurisdiction" under 28 U.S.C. Sec. 1331 where plaintiffs' complaint is predicated on the claim that defendant, a state official acting under a state law, is attempting to dispose of School Trust Fund lands for less than their value in violation of a trust created by the Federal-State Land Grant Compact?

STATUTORY PROVISIONS INVOLVED

This petition involves the Acts of Congress and portions of the Constitution of Minnesota creating the trust for school lands in the Federal-State (Minnesota) Land Grant Compact as follows:

The Act of Congress of July 13, 1787, U. S. Rev. Stat. 2nd Ed. 1878, p. 13, Art. III;

The Act of Congress of March 3, 1849, 9 U. S. Stat. at Large 403, Sec. 18;

The Act of Congress of February 26, 1857, 11 U. S. Stat. at Large 166, Sec. 5;

The Act of Congress of May 11, 1858, 11 U. S. Stat. at Large 285;

Constitution of Minnesota, Article II, Sec. 3; Article VIII, Sections 1, 2 and 3.

This petition also involves provisions of Federal and State laws relating to the acquisition and disposition of Minnesota School Trust Lands as follows:

The Act of Congress of January 8, 1971, Public Law No. 91-661, 84 Stat. 1970; Sec. 101;

Laws of Minnesota 1971, Regular Session Chapter 852, Sec. 3 (2), Sec. 8, Sec. 9; M.S.A. 84B.03(2), M.S.A. 84B.08, M.S.A. 84B.09.

Other Federal Statutory provisions involved are 28 U.S.C. 1254, 28 U.S.C. 2106 and 28 U.S.C. 1331.

The pertinent text of the above laws are set forth in the appendix here.

STATEMENT OF THE CASE

1. Background: Federal-State Compact

Congress, in 1849, passed the Minnesota Organic Act creating the Territorial Government of Minnesota, 9 U.S. Stat. 403 (1849). This Act provided that specific lands would be reserved for schools. (A. 8).

In 1857, Congress passed the Minnesota Enabling Act, allowing the people of the territory to form a Constitution and State Government "preparatory to their admission into the Union", 11 U. S. Stat. 166 (1857). The Enabling Act required

compliance with certain mandatory conditions prior to admission to the Union and offered some propositions which the people of Minnesota were free to accept or reject. One of the latter propositions concerned the previously reserved school lands. The Enabling Act offered to grant the lands to Minnesota if the State would use them for schools (A. 9).

The people of Minnesota voted to become a State and proposed a Constitution accepting the offers of the Enabling Act, Minnesota Constitution Article 2, Section 3 (A. 9, 10). The proposed Constitution specifically provided that the school lands would never be sold "otherwise than at public sale" and that the proceeds of any such sale would be paid into a "perpetual school fund" which would "forever be preserved inviolate and undiminished", Minnesota Constitution Article 8, Sec. 2 (A. 10, 11).

In 1858, Congress passed the Minnesota Admission Act, which admitted Minnesota, under its Constitution, to the Union, 11 U. S. Stat. 285 (1858). (A. 11).

This Federal-State Compact and the trust arising thereunder is still operative. Proceeds from the sale and lease of school lands have accumulated and today the trust fund has a principal of approximately 450 million dollars. (A. 16). Furthermore, much of the original trust lands have not yet been sold or leased.

2. The Proposed Disposition of School Trust Lands

Two recent Acts, one Federal and one State, attempt to create a park in northern Minnesota. This proposed park is to include substantial acreages of the lands held under the trust of the Federal-State Land Grant Compact. (A. 14, 15).

The Federal Act provides for the establishment of the park after all lands in the area held by the State of Minnesota are *donated* for the park. Public Law No. 71-661, Sec. 101 (Jan. 8, 1971). (A. 12).

The Minnesota Act attempts to *donate* the School Trust Lands to the park. In an effort to satisfy the requirements of the trust in the Federal-State Land Grant Compact, it provides for a form of condemnation of the School Trust Lands involved, Chap. 852 Minn. Sess. Law Serv. (1971) Sec. 3(2); M.S.A. 84B.03(2), (A. 12). However, this State Act predetermines the outcome of such proceedings by legislatively fixing a specified and absolute dollar limitation on the amount to be paid to the School Trust Fund for the trust lands, Chap. 852 Minn. Sess. Law Serv. (1971), Sec. 9 (A. 12,13). Likewise, it fails to identify the parties to such proceeding or to provide for any representation for the School Trust Fund, Chap. 852 Minn. Sess. Law Serv. (1971) Sec. 3 (2); M.S.A. 84B.03(2). (A. 12).

3. Present Action

Plaintiff schoolchildren, as primary beneficiaries of the school trust, assert jurisdiction under the laws of the United States and bring this action in their own behalf and for all of the schoolchildren of Minnesota. (A. 14). They allege that the Compact requires the School Trust be secured in payment of judicially determined full value for the disposition of School Lands (A. 15, 16). The value of the school land in the proposed park area, they assert, grossly exceeds the limited amount provided in the State Act. (A. 15). They contend that such limitation in amount of compensation and the procedural insufficiencies of the State Act contravene the requirements of

the Compact and the beneficiaries of the Compact will be deprived of the full benefit of the grant. (A. 16, 17).

The defendant, by his motion to dismiss, admits these allegations. Plaintiffs seek a Declaratory Judgment that the State Act contravenes the trust provisions of the Compact. They seek to enjoin the defendant from acquiring the school trust lands under the provisions of the State Act. (A. 17, 18).

4. Proceedings in the Courts Below

After plaintiffs' Complaint was served, defendant moved to dismiss the action on the ground, among others, that the Court lacked subject matter jurisdiction because the complaint did not show a controversy arising under a law of the United States.

The District Court for the District of Minnesota dismissed the complaint for lack of subject matter jurisdiction (A. 2, 3, 4). A Judgment of Dismissal was entered pursuant to that order on November 12, 1971.

On December 3, 1971, plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit. On June 8, 1972, the Court of Appeals filed its Judgment affirming the District Court. (A. 5).

REASONS FOR GRANTING THE WRIT

(a) The Eighth Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeal on the same matters.

(b) The Eighth Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

ARGUMENT

In this case, the District Court dismissed the complaint for the reason that "the Court lacks subject matter jurisdiction". The Court of Appeals affirmed on the basis of the District Court's opinion. The question here is whether the complaint sets forth a controversy arising under federal law.

(1) Preliminary Discussion

A complaint which bases its claim directly on federal laws presents a federal question, *Bell v. Hood*, 327 U. S. 678, 66 S. Ct. 773 (1946); *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 33 S. Ct. 410 (1913); *McGoon v. Northern Pacific Railway Co.*, 204 F. 998 (D.C. N.D. 1913); *Mishkin, The Federal "Question" in the District Courts*, 53 Col. Law Rev. 157 (1953).

The complaint here asserts a claim based on the Enabling Act and the Admission Act. Those federal laws, with sections of the Minnesota Constitution, are integral and inseparable parts of the Federal-State (Minnesota) Land Grant Compact. In those circumstances, the federal aspects raise a federal question, *Smith v. Kansas City Title and Trust*, 255 U. S. 180, 41 S. Ct. 243 (1921); *Hart and Wechsler, The Federal Courts and the Federal System* (1953) 766.

(2) Conflict With Other Courts of Appeal

The conflict exists in three dimensions, (a) the lower Court here declined to recognize the Federal-State Land Grant Compact as a law of significant federal interest, (b) the lower Court here declined to follow the Federal Policy of Judicial protection of the School lands trusts, (c) the lower Court

failed to consider or overlooked the long established doctrine that the measure of "Just Compensation" in condemnation is a matter of Judicial and not Legislative decision.

(a) Federal-State Land Grant Compact:

The recognition of the Compact as a federal law of significance is basic to "subject matter jurisdiction". The failure to recognize this is not only in conflict with other Courts of Appeal, but contrary to every known case considering the matter.

The Ninth Circuit Court of Appeals in U. S. v. 111.2 Acres of Land, 435 F. 2d 561 (1970), considered the Federal-State Land Grant Compact. If there unanimously affirmed and adopted the scholarly opinion of Chief Judge Powell of the District Court, 293 F. Supp. 1042 (E. D. Wash. 1968). In that opinion, it was said,

> *"II The Enabling Act*
>
> Section 10 of the Enabling Act is a legislative grant to the States," 293 F. Supp. 1044.
>
> *"IV Law and Compact*
>
> A legislative grant is both compact (or contract) and law," 293 F. Supp. 1048.
>
> Section 10 of the Enabling Act and Art. XVI of the Washington Constitution constitute a declaration of trust . . . The equitable interest of the public school system, the cestui que trust, has been interposed between the United States (grantor) and the State (trustee) . . . *This trust is real, not illusory.* A donation to the United States under (Wash. Statute) would constitute a breach of trust which the Court will not countenance." 293 F. Supp. n. 6, 1049. (Emphasis added.)

Other cases holding that an Enabling Act, State Constitution and Admission Act, constitute a Federal-State Compact, trust agreement and law are *U.S. v. Ervien, Cm'r of Public Land of New Mexico*, 246 Fed. 277 (8th Cir. 1917) aff'd 251 U.S. 41, 40 S. Ct. 75 (1919) (State cannot divert 3 cents of each dollar derived from sale of School Trust Lands—all compensation must be paid to School Trust); *Lassen v. Arizona*, 385 U.S. 458, 87 S. Ct. 584 (1967) (a certiorari proceeding in this Court—State cannot acquire a right of way over School Trust Lands without payment of full compensation and cannot set off any enhancement or benefit); *U.S. v. Fenton*, 27 F. Supp. 816 (D.C. Idaho 1939). (Trustee of school lands has priority on mortgages on school land because of Federal-State Compact); *Murtaugh v. Chicago M. and St. P. Ry. Co.*, 102 Minn. 52, 112 N.W. 860 (1907) (to allow private party to acquire title to school lands by adverse possession would contravene Federal-State Trust); *State v. Central Nebraska Power Irr. Dist.*, 143 Neb. 153, 8 N.W. 2d 841 (1943); *State v. Brian*, 84 Neb. 30, 120 N.W. 916 (1909).

(b) Conflict With Federal Judicial Policy

The Ninth Circuit Court of Appeals in its unanimous affirmance and adoption of Judge Powell's opinion in *U.S. v. 111.2 Acres of Land*, supra, acknowledged the Federal Judicial Policy of extending protection to the School Lands Trusts. The Court said,

> "This construction accords with a policy favoring Judicial protection of the school lands trusts." (293 F. Supp. 1047 n. 3), and
>
> "There has been a history of unauthorized diversion by the States of school land and proceeds. . . . Therefore it

has fallen to the Courts to protect the trust corpus and assure that it is devoted solely to support the common schools. . . . A recent example of judicial protection of school land trusts is Lassen v. Arizona, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967). . . . The Court rejected this contention (of U.S.) to insure maximum support of the trust." (293 S. Supp. 1047, n. 2).

(c) Conflict on Just Compensation

The lower Court here failed to acknowledge the most basic rule in the determination of "just compensation". That rule is that such compensation must be first adequately secured and the amount thereof is a judicial and not a legislative matter. Here the State Act of the legislature fixes a specific and absolute maximum amount to be paid for the school trust lands, Chap. 852, Minn. Sess. Law Serv. (1971) Sec. 9, M.S.A. 84B.09 (A. 12, 13).

The decision in *Rockaway Pacific Corp. v. Stotesbury, et al.*, 255 F. 345 (N.D. N.Y. 1917—3 Judge Court) held such a statute void in that just compensation was not first secured and that the amount of compensation was a judicial and not a legislative question. See also *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 13 S. Ct. 622, at 626 where this Court said,

> "By this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. *But this is a judicial and not a legislative question.*" (Emphasis added.)

Other cases to the same effect are *Keystone Associates v. Moerdler*, 19 N.Y. 2d 78, 224 N.E. 2d 700 (1966); *State v. McCook*, 109 Conn. 621, 147 A. 126 (1929); *Godfrey v. District*

Court, 44 Minn. 299, 46 N.W. 355 (1890). In *Keystone*, supra, the Court said,

> ". . . the determination of just compensation is a judicial function and . . . the legislature cannot set the maximum figure in the amount of compensation that will be paid." 224 N.E. 2d 703.

(3) Conflict With Applicable Decisions of This Court

The decision here below is in conflict with the holdings of this Court in *Bell v. Hood*, supra, and *The Fair v. Kohler Die & Specialty Co.*, supra. Those decisions make it clear that where a complaint bases its claim directly on a federal law, a federal question is presented. Here, as stated, the claim is based on the Enabling Act and the Admission Act.

The fact that those federal laws comprising the Federal-State Compact do not expressly create a cause of action is not determinative. The holding below is in conflict with *J. I. Case Company v. Borak*, 377 U.S. 426, 84 S. Ct. 1555 (1964); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 65 S. Ct. 235 (1944); and see *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 430 U.S. 388, 91 S. Ct. 1999 at 2008 n. 11 (Opinion of Mr. Justice Harlan). See also *Reitmeister v. Reitmeister*, 162 F. 2d (2nd Cir. 1947). In those cases, this Court has recognized that a right of action may be inferred from federal statutes. In *Lassen v. Arizona*, supra, the Enabling Act involved specifically made it the duty of the Attorney General to enforce the provisions of that Compact. It is to be noted in that regard, the last clause therein read,

> "Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act," 87 S. Ct. 592.

It is reasonable to infer therefrom that a right to enforce existed in a citizen by implication.

In *U.S. v. Ervien, Cm'r of Public Lands of New Mexico*, supra, and in *Lassen v. Arizona*, supra, this court has recognized the significance and the federal interest in the Federal-State Land Grant Compacts. The failure of the lower Courts to do so here is a direct conflict. In addition, in *Lassen*, supra, (87 S. Ct. 585, n. 3) this Court observed that between 1803 and 1962, the United States granted a total of 78,000,000 acres of land to all the states in support of the common schools, and stated,

> "We brought this case here because of the importance of the issues presented both to the United States and to the States which have received such lands." 87 S. Ct. 586.

CONCLUSION

For the reasons stated, petitioners respectfully pray that this Court grant the Petition for Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

WILLIAM W. ESSLING
Attorney for Petitioners
730 Minnesota Building
St. Paul, Minnesota 55101

JOHNSON, ESSLING,
WILLIAMS & ESSLING
Of Counsel

APPENDIX

DOCKET ENTRIES—DISTRICT COURT

8- 6-71—Filed Complaint.

Issued Summons.

Case assigned to J. Devitt, per card No. 217.

8-18-71—Filed summons, returned served 8-11-71.

9- 7-71—Filed Deft's Notice of Motion and Motion To Dismiss Complaint. Noticed for hearing 9-20-71 at 9 A.M. or as soon thereafter as counsel can be heard. Memorandum of Points and Authorities attached. Aff. of Serv. by Mail 8-31-71 attached.

10- 4-71—Entered Record of Hearing on Defendant's Motion to Dismiss complaint; Argued, taken under advisement. Plaintiff to submit briefs within 20 days and defendant in 7 days thereafter. (Devitt-J.; Lindberg-reporter)

11-12-71—Filed and entered Memorandum and Order dismissing this action for lack of jurisdiction (Devitt-J)

Filed and entered judgment pursuant to the foregoing order.

Mailed conformed copies of the foregoing order to counsel for the respective parties.

12- 3-71—Filed plaintiffs' notice of appeal.

Filed bond on appeal.

Mailed copy of notice of appeal to Attorney General, State of Minnesota, State Capitol, St. Paul, Minn. 55101, and to Wayne H. Olson, 414 Roanoke Bldg., Mpls., Minn. 55402.

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MARK P. ESSLING, a minor, and EDWARD J. ESSLING, a minor, by JAMES ESSLING, their father and natural guardian,

Plaintiffs,

vs.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Defendant.

3-71-Civ-201

MEMORANDUM & ORDER

David Essling, St. Paul, Minnesota, attorney for plaintiffs. Warren Spannaus, Attorney General of Minnesota and Wayne H. Olson, Special Counsel, Minneapolis, Minnesota, attorneys for defendant.

This is an action brought on behalf of two minor children who are citizens and residents of the United States and of the State of Minnesota and students in the public schools of the state and on behalf of 930,000 public school children of Minnesota similarly situated.[1] Plaintiffs seek a declaration that the acts of defendant, in allegedly attempting to effect a donation and gift of "school trust lands" to the United States for use in the proposed Voyageurs National Park constitute a breach of the trust agreement between the United States and

[1] Defendant is the Commissioner of Administration for the State of Minnesota and is charged with authority to acquire and possess the lands in question.

the State of Minnesota and a violation of specific statutes of the United States.[2]

Defendant has moved to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that the court lacks subject matter jurisdiction.[3]

It is well settled that the jurisdiction of a federal court must be made to appear affirmatively, *Scroggin Farms Corp. v. McFadden*, 165 F. 2d 10 (8th Cir. 1948), and where the jurisdiction is challenged, plaintiff has the burden of proving its existence. *Gibbs v. Buck*, 307 U.S. 66, 59 S. Ct. 725 (1939); *Reese v. Holm*, 31 F. Supp. 435 (D. Minn. 1950). Plaintiffs here have failed to meet this burden.

In order for jurisdiction to be properly based on the existence of a "federal question" that question must constitute an essential element of plaintiff's cause of action and form an integral part of his case. *Shulthis v. McDougal*, 225 U.S. 561, 32 S. Ct. 704 (1912); *Cogswell v. Board of Levee Comr's*, 142 F. 2d 750 (5th Cir. 1944). The question must be real and substantial and not conjectural. *Koll v. Wayzata State Bank*, 397 F. 2d 124 (8th Cir. 1968). It is not enough that the question of federal law be merely lurking in the background. *Stanturf v. Sipes*, 335 F. 2d 224 (8th Cir. 1964), *cert. denied*, 379 U.S.

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[2] The specific statutes plaintiff uses as his basis for asserting jurisdiction include the Minnesota Organic Act, 9 U.S. Stat. 403 (1849), the Minnesota Enabling Act, 11 U.S. Stat. 166 (1857), and the Minnesota Admission Act, 11 U.S. Stat. 285 (1858).

[3] Plaintiff seeks to predicate jurisdiction upon 28 U.S.C. §1331 which provides, "The district courts shall have original jurisdiction of all civil actions . . . and arising under the Constitution, laws, or treaties of the United States." Defendant urges that the complaint also fails to show the existence of an actual controversy between the parties, that the plaintiff has no capacity to sue, and that the action is premature. In light of the determination that the court lacks subject matter jurisdiction, it is not necessary to reach a decision on these issues.

977, 85 S. C. 676 (1965); *Martin v. Graybar Electric Co.*, 285 F. 2d 619 (7th Cir. 1961).

The plaintiffs have not shown the presence of a substantive right or legal interest derived from federal law. See *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, —— U.S. ——, 91 S. Ct. 1999 (1971), (Opinion of Mr. Justice Harlan). Here it cannot be said that the right of plaintiffs to recover depends on the construction to be given the Constitution or laws of the United States. *Wheeldin v. Wheeler*, 373 U.S. 647, 83 S. Ct. 1441 (1963); *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773 (1946). The case upon which plaintiffs most heavily rely, *Lassen v. Arizona*, 385 U.S. 492, 87 S. Ct. 584 (1967) does not provide authority in support of the jurisdiction claims.[4]

DEFENDANT'S MOTION to dismiss the action for lack of subject matter jurisdiction is granted.[5]

Dated: November 12, 1971.

EDWARD J. DEVITT
Chief Judge
United States District Court

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[4] *Lassen* was commenced as an original proceeding before the Arizona Supreme Court, not in the federal courts. In granting certiorari to review the decision, the Court stated, "We brought this action here because of the importance of the issues presented both to the United States and to the States . . ." *Lassen*, at 586. A further distinction is possible. Unlike the Minnesota Enabling Act, the enabling act involved in *Lassen* contained detailed provisions as to the manner of disposal of the trust lands and expressly required the Attorney General of the U.S. to maintain whatever proceedings might be necessary to enforce its terms. *Lassen*, at 585.

[5] Plaintiffs here are not left without a forum. Although they still may be faced with the argument that there are not adverse interests presented here, the state courts are available.

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1034 September Term, 1971

MARK P. ESSLING, a minor, and EDWARD J. ESSLING, a minor, by JAMES ESSLING, their father and natural guardian,

Appellants,

vs.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Appellee.

Appeal From the United States District Court for the District of Minnesota.

This cause came on to be heard on the record from the United States District Court from the District of Minnesota and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of November 12, 1971, of the said District Court appealed from in this cause be and is hereby affirmed in accordance with the opinion of this Court this day filed herein.

June 8, 1972.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1034

MARK P. ESSLING, a Minor, and EDWARD J. ESSLING, a Minor, by JAMES ESSLING, Their Father and Natural Guardian,

Appellants,

v.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Appellee.

Appeal From the United States District Court for the District of Minnesota.

Submitted: May 12, 1972.
Filed: June 8, 1972.

Before Matthes, Chief Judge, Heaney and Stephenson, Circuit Judges.

Per Curiam.

Plaintiffs-appellants are students of the public schools in Minnesota. They filed a complaint in the United States District Court for the District of Minnesota against the Commissioner of Administration of Minnesota, alleging that the defendant in concert with others intended to violate a Federal-State compact by disposing of "School Trust Lands" in Min-

nesota for less than the full value of the land. The complaint sought injunctive relief and a declaration that the "State Park Act," Chapter 852 Minnesota, Laws of 1971, was violative of the "Laws of the United States [and] the Constitution of Minnesota."

In response to a motion to dismiss, Chief Judge Devitt granted the motion and dismissed the action for lack of subject matter jurisdiction. The appeal is from the order of dismissal.

Judge Devitt demonstrated in a soundly reasoned opinion, (unreported) that the complaint did not present a real and substantial federal question. Judge Devitt documented his opinion with controlling authority. We are satisfied that subject matter jurisdiction does not exist in the federal courts and that the cause was properly dismissed.

Our examination of the record and the contentions of appellant convinces us that their fears are more imaginary than real. If and when the land in question is acquired for park purposes, appellants or other individuals having proper standing will certainly be entitled to their day in court in the event the consideration paid for the land does not represent its fair market value.

We affirm on the basis of the District Court's opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(1)

NORTHWEST ORDINANCE 1787

Act of Congress, July 13, 1787

U. S. Rev. Stats., 2d Ed. 1878 P. 13

An Ordinance for the government of the territory of the United States northwest of the river Ohio.

14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as *articles of compact*, between the original States and the people and States in the said territory, and forever remains unalterable, unless by common consent, to wit:

"Art. III. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, *schools and the means of education shall forever be encouraged. . . .*"

(2)

ORGANIC ACT

Act of Congress, March 3, 1849

9 U. S. St. at Large 403

An Act to establish the Territorial Government in Minnesota

"Sec. 18. And be it further enacted, That *when the lands* in the said Territory shall be surveyed under the direction of the government of the United States, Preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, *reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same. . . .*"

(3)

ENABLING ACT

Act of Congress, Feb. 26, 1857

11 U. S. S. St. at Large 166

An act to authorize the People of the Territory of Minnesota to form a Constitution and State Government, preparatory to their Admission to the Union on an equal Footing with the original States.

"Sec. 5. And be it further enacted, That *the following propositions be, and the same are hereby offered to the said convention of the people of Minnesota for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory on the United States and upon the said State of Minnesota to wit:*

First. That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been disposed of, other lands, equivalent thereto and as contiguous as may be, *shall be granted to said State for use of schools.*

CONSTITUTION OF MINNESOTA

Article 2

Section 3

3. Acceptance of propositions in enabling act

Sec. 3. *The propositions contained in the act of Congress entitled,* "An act to authorize the people of the Territory of Minnesota to form a constitution and state government, preparatory to their admission into the Union on equal footing with the original states," *are hereby accepted, ratified and confirmed, and shall remain*

irrevocable without the consent of the United States; and it is hereby ordained that this State shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title to said soil to bona fide purchasers thereof; and no tax shall be imposed on lands belonging to the United States and in no case shall non-resident proprietors be taxed higher than residents.

CONSTITUTION OF MINNESOTA

Article VIII

Sections 1 and 2

1. Uniform system of public schools

Sec. 1. The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature *to establish a general and uniform system of public schools.*

2. Proceeds of school lands to be a perpetual fund

Sec. 2. The proceeds of *such lands as are or hereafter may be granted by the United States for the use of schools* within each township of this State shall remain a perpetual school fund to the State; and not more than one-third (1/3) of said lands may be sold in two (2) years, one-third (1/3) in five (5) years and one-third (1/3) in ten (10) years; but the lands of the greatest valuation shall be sold first; provided, *that no portion of said lands shall be sold otherwise than at public sale. The principal of all funds arising from sales or other disposition of lands or other property, granted or entrusted to this State in each township for educational purposes, shall forever be preserved inviolate and undiminished;* and the income

arising from the lease or sale of said school land shall be distributed to the different townships throughout the State; in proportion to the number of scholars in each township, between the ages of five and twenty-one years; and shall be faithfully applied to the specific objects of the original grants or appropriations.

Act of Congress of May 11, 1858
11 U. S. Stat. at Large 285

ACT OF ADMISSION INTO THE UNION

WHEREAS, An act of Congress was passed February twenty-sixth, eighteen hundred and fifty-seven, entitled "An act to authorize the people of the Territory of Minnesota to form a constitution and state government preparatory to their admission into the Union on an equal footing with the original states"; and, whereas, the people of said Territory did, on the twenty-ninth day of August, eighteen hundred and fifty-seven, by delegates elected for that purpose, form for themselves a constitution and state government, which is republican in form, and was ratified and adopted by the people at an election held on the thirteenth day of October, eighteen hundred and fifty-seven, for that purpose; therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever.

Publ. L. No. 71-661, Sec. 101 (Jan. 8, 1971)

. . . the Secretary shall not establish the park until the lands owned by the State of Minnesota and any of its political subdivisions within the boundaries shall have been donated for the purposes of the park . . .

Chap. 852, Minn. Sess. Law Serv. (1971)

Sec. 3 . . .

Subd. 2. [TRUST FUND LAND; CONDEMNATION] For the purpose of satisfying the public sale requirements of the Minnesota Constitution, Article 8, Section 4, and other applicable provisions of Minnesota's Constitution, including but not limited to Article 4, Section 32, and in keeping with the decision of the Minnesota Supreme Court in the case of Independent School District of Virginia v. State, 124 Minn. 271, where the court held that condemnation satisfied the public sale requirement of the Minnesota Constitution, the Commissioner of Administration shall acquire by condemnation, fee title to all trust fund lands lying within the boundaries of Voyageurs National Park . . . Before any parcel of trust land is donated to the United States, the Commissioner of Administration shall certify to the governor that the parcel has been condemned, the condemnation award has been paid, and the time to appeal has expired.

Chap. 852, Minn. Sess. Law Serv. (1971)

Sec. 9 [LIMITATION ON APPROPRIATIONS] It is the intent of the legislature that the appropriations made by . . . Section 8, as proceeds from the sale of Voyageurs National Park Bonds, shall not exceed

$6,000,000.00 and shall constitute the total expenditure of the state or any state agency for the purposes of this act, notwithstanding any other provisions of law or any appropriations made by law.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MARK P. ESSLING, a minor, and EDWARD J. ESSLING, a minor, by JAMES ESSLING, their father and natural guardian,

Plaintiffs,

vs.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Defendant.

COMPLAINT
Civil Action No. 3-71-201

Plaintiffs allege:

I. *JURISDICTION*

(a) This action arises under the Laws of the United States as hereinafter more fully appears;

1) The Act of Congress of July 13, 1787, U.S. Rev. Stat. 2nd Ed. 1878, p. 13, Art. III;

2) The Act of Congress of March 3, 1849, 9 U.S. Stat. at Large 403, Sec. 18;

3) The Act of Congress of February 26, 1857, 11 U.S. Stat. at Large 166, Sec. 5;

4) The Act of Congress of May 11, 1858, 11 U.S. Stat. at Large 285;

5) The Act of Congress of January 8, 1971, P. L. 9-661, 84 Stat. 1970,

and all laws supplementary and amendatory thereof.

(b) The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

II. *PARTIES*

(a) *Plaintiffs*

1) Plaintiff, Mark P. Essling, is a minor, eleven years of age. Plaintiff, Edward J. Essling, is a minor, nine years of age.

2) That both of said plaintiffs are citizens and residents of the United States and of the State of Minnesota, residing at 1241 Jefferson Avenue, St. Paul, Minnesota 55105.

3) That both of said plaintiffs bring this action by James M. Essling, their father and natural guardian.

4) That both of said plaintiffs are students of the public schools of Minnesota and attend the Randolph Heights Public Elementary School, Independent School District No. 625, of St. Paul, Minnesota. They bring this action in their own behalf and on behalf of more than 930,000 public school children of Minnesota similarly situated.

(b) *Defendant*

The defendant is the Commissioner of Administration of the State of Minnesota.

III. *SCHOOL TRUST LANDS*

(a) That in the counties of St. Louis and Koochiching, Minnesota, within the geographic boundaries described in

Section 102 of the Act of Congress, referred to herein—Paragraph 1 (A) (5), are certain lands known, classified and hereinafter called, "School Trust Lands" comprising approximately 46,000 acres.

(b) That said "School Trust Lands" include and border upon numerous lakes and streams, have more than 160 miles of water and lakeshore frontage of a value in excess of 20 million dollars.

That said "School Trust Lands" contain forests which embrace numerous stands of virgin timber capable of scientific growth, management and selective harvesting, all of great value.

That said "School Trust Lands" are located within and adjacent to geologic areas of vast mineral resources and are known to contain deposits of iron ore, copper, nickel and other minerals all of great and yet unmeasured value.

(c) That said "School Trust Lands" with the appurtenant lakeshore frontage, water, timber and mineral rights are of a fair market value in excess of 100 million dollars.

IV. *TRUST - COMPACT - AGREEMENT*

(a) That in the year 1858, pursuant to an historic policy, the United States granted said "School Trust Lands" to—and the same were accepted by—the State of Minnesota upon terms of trust, compact and agreement. It being provided that said lands were granted and accepted for the use of the schools; that said lands would never be sold except for value at public sale; that the proceeds from such sales be set aside in a perpetual fund to be kept inviolate forever with only the income to be used for the benefit of the school children and apportioned according to their numbers.

(b) That the policy, terms and provisions of said Trust, compact and agreement are contained in the Acts of Congress herein referred to—paragraph I (A) (1), (2), (3) and (4) (see Exhibit A attached), the laws supplementary and amendatory thereof; in the Constitution of Minnesota, Article II, Section 3, Article VIII, Sections (1), (2) and (3) and in the laws and amendments supplementary thereto (see Exhibit B attached).

(c) That through the years past the obligations and duties of said trust, compact and agreement have been faithfully recognized, honored and kept by officials of the United States and the State of Minnesota.

That as a result thereof, the proceeds from the lawful sale and use of said "School Trust Lands" have accumulated in a perpetual trust fund now exceeding 450 million dollars, which together with the lands here concerned are trust assets for the present and future generation of Minnesota's school children.

V. *THE WRONGFUL, ILLEGAL ACTS AND INTENTIONS.*

(a) That the defendant acting as the Commissioner of Administration of Minnesota and pursuant to a plan, scheme and device under color of authority by an Act of the Legislature of Minnesota, Chapter 852, Laws of 1971, June 7, 1971, hereinafter called "State Park Act", in concert with others including various officials of the State, threatens, intends, plans and is preparing to acquire, change and affect the title, classification, use and possession of the said "School Trust Lands" all for the purpose of effecting a donation and gift of the same for a proposed national park without payment of value or reimbursement in full therefor to the said perpetual trust fund of Minnesota's school children.

(b) That the defendant, and others with whom he acts and plans, pretend and assert authority to so acquire and possess the "School Trust Lands" through the power of eminent domain by reason of certain provisions of said "State Park Act" (Sections 8 and 9 thereof purport to appropriate and designate only a specified and limited fund therefor).

That said "State Park Act" does not provide adequate or just compensation for any acquisition of "School Trust Lands" and makes no provision for payment of compensation in excess of such limited amount therein specified.

(c) That defendant, among other things, pursuant to said plan, scheme and device, pretends and asserts that by virtue of the terms of said "State Park Act", the water and mineral rights appurtenant to the "School Trust Lands" will be reserved to the State of Minnesota in trust for its schools. That in fact the defendant's said plan, scheme and device and the said "State Park Act" specify, intend and provide to the contrary so that these water and mineral rights if reserved will be so only under a perpetual covenant that they never be used.

(d) That the said acts and intended acts of the defendant and the said "State Park Act" are illegal and unlawful, violate the laws of the United States, the Constitution of Minnesota, and constitute an unlawful breach and dishonor of the letter and spirit of the said trust, compact and agreement between the United States and the people of Minnesota; they damage, depreciate, dissipate and injure the assets and rights of the beneficiary school children of Minnesota.

WHEREFORE, plaintiffs pray judgment:

1. Declaring and adjudging that the acts and intended acts of the defendant to acquire and effect the said donation and

gift of the "School Trust Lands" of Minnesota are unlawful and illegal and are in violation of the laws of the United States, the Constitution of Minnesota and constitute an unlawful breach of the trust, compact and agreement between the United States, the people and government of Minnesota.

2. Declaring and adjudging that the said "State Park Act" as referred to herein is illegal, unlawful, in violation of the laws of the United States, the Constitution of Minnesota, and is unlawful and a violation of the said trust, compact and agreement between the United States, the people and government of Minnesota.

3. Forever enjoining and restraining the defendant from acquiring or attempting to acquire the said "School Trust Lands" or aiding or abetting the donation or gift of the same pursuant to said alleged plan, scheme and device or under and pursuant to any provision of said "State Park Act".

4. For costs and disbursements herein.

DAVID ESSLING
Attorney for Plaintiffs
730 Minnesota Building
St. Paul, Minnesota

Of Counsel:
Johnson, Essling, Williams and Essling
Attorneys at Law
730 Minnesota Building
St. Paul, Minnesota 55101
William W. Essling
Attorney at Law
730 Minnesota Building
St. Paul, Minnesota 55101